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SUPREME COURT OF THE UNITED STATES

No. 43 OCTOBER TERM 1935

CLYDE MALLORY LINES

Appellant

vs.

STATE OF ALABAMA, *ex rel.* STATE DOCKS COMMISSION

Appellee

ON APPEAL FROM SUPREME COURT OF ALABAMA

BRIEF FOR APPELLANT

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SUPREME COURT OF THE UNITED STATES

CLYDE MALLORY LINES Appellant vs. STATE OF ALABAMA, *ex rel.* STATE DOCKS COMMISSION Appellee	No. 43 October Term 1935

BRIEF FOR APPELLANT

This is an appeal from a judgment of the Supreme Court of Alabama entered January 24, 1935, which affirmed a judgment of the Circuit Court of Mobile County for $2190 in favor of appellee (plaintiff below) against appellant (defendant below) based on "harbor fees" charged against appellant in respect of its steamships at Mobile during the period from February 4, 1928 to September 29, 1932. The opinion of the Supreme Court appears at R. 58-65 and is reported in 229 Ala. 624; 159 So. 53. The Circuit Court did not file an opinion, but the theory of its decision appears from "Ruling on Demurrers" (R. 20-21).

The Supreme Court of Alabama allowed an appeal to this Court April 10, 1935 (R. 67-68). Appellant duly filed the jurisdictional statement, and this Court by order of May 27, 1935, postponed further consideration of the question of jurisdiction to the hearing on the merits.

JURISDICTION

Jurisdiction of this Court is invoked under Judicial Code § 237(a), as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 937; Title 28 U. S. C. § 344(a).

The judgment for $2190 in question is for "harbor fees" at the rate of $7.50 for each of appellant's vessels which entered the port of Mobile during the period February 4, 1928 to September 29, 1932. These fees were prescribed by an order of the State Docks Commission, a State agency, first created by the Alabama Legislature in 1923 (Ala. Acts 1923, p. 330) and authorized by an Act of January 17, 1927 (Ala. Acts 1927, p. 12) to

"fix from time to time reasonable rates of charges for all services and for the use of all improvements and facilities provided under the authority of this Act" (Opinion, R. 59).

The Docks Commission's order of February 11, 1928 (R. 28) fixed a schedule including, in addition to fees for specified services, the following (R. 37):

"Vessels under 500 tons—making weekly trips..	$2.50
Vessels under 500 tons.....	5.00
Vessels 500 tons and over.....	7.50"

This was a re-adoption of rules made February 25, 1924 (R. 23-24).

Appellant's vessels were of over 500 tons registered tonnage and were operated in interstate coastwise trade between New York and Mobile (R. 58).

The suit was begun February 4, 1933 (R. 22). Demurrers were overruled (R. 17) and the answer to the complaint challenged the legality of the $7.50 charge against appellant's vessels on the grounds: (1) that it

was a duty of tonnage forbidden by Art. I, § 10, Cl. 3, of the Federal Constitution; (2) that it imposed an unlawful burden on interstate commerce in violation of Art. I, § 8, Cl. 3, of the Constitution (R. 18). The Supreme Court of Alabama held the charge lawful and not in violation of the Constitution (R. 58-65).

The order of the State Docks Commission pursuant to the 1927 Statute had the status of a statute within the meaning of Judicial Code § 237-(a), and this Court has jurisdiction of this appeal. See *Hamilton* v. *Regents*, 293 U. S. 245, 257-258; *King Mfg. Co.* v. *Augusta*, 277 U. S. 100; *Sultan Ry.* v. *Dept. of Labor*, 277 U. S. 135.

Statement of the Case

Appellant's steamers have been regularly operating in the coastwise trade between New York and Mobile and other ports, for many years. The steamers did not use the State Docks, having another dock separate and apart, R. 48.

The defendant's Mobile agent testified, R. 51:

"All bills on the defendant's vessels for services rendered to each vessel have already been paid."

This was not controverted. He also testified, R. 51:

"There was no service whatsoever rendered defendant's vessel, or any one of them, for which these charges are being made."

This was not controverted either. Indeed, appellee's counsel stated at the trial that the fee in question was not for "a specific service to each particular boat or ship, but a service generally rendered each and every ship and all shipping that should come into the port" (R. 20). The

Mobile Harbor Master testified that the charge was "not for shifting" or "mooring" appellant's vessels (R. 46) nor "for the use of the State Docks" (R. 48).

In the course of his cross-examination he testified further, R. 46:

"Q. The charge, as a matter of fact, is for the mere privilege of entering the harbor, isn't it?

A. No sir, *it is a fee charged for seeing that the conditions are safe for ships to get in and out of the harbor,* and we feel like we are giving service in that way.

"Q. And is that a service for one boat any more that it is for another?

A. No sir.

"Q. It is just *a service for the public?*

A. *That is all"* (Italics ours).

That the charges in question were not compensation for specific service but were levied to raise revenue for public purposes, *i. e.,* harbor policing, is obvious from the final testimony of the Harbor Master as follows, R. 50:

"The charge that is made in this case is for my supervision over the harbor and the regulations that are made and enforced for the safety of ships coming in and going out. That is a true statement of the plaintiff's claim in this suit. The City of Mobile has traffic officers. I know that the City directs traffic in the city through its traffic officers. I suppose that that is for the safety of the motorists using the highways. It is for the common good. As to the difference in principle between what I do and the City does through its traffic officers, I think it requires a little more knowledge of the ship's rights to take care of ships. In principle I suppose it is the same thing".

The Harbor Master also testified (R. 47) that the charges in suit were "for trips in and out of the harbor" • • • "only for trips", not being made "for boats that remain in the harbor all the time" • • • "the charge is assessed wholly and without regard to the value of the boat".

It appears from the Harbor Master's testimony that the channel was dredged and kept free of obstructions by the United States Engineers, R. 48. This is pursuant to various Federal statutes.

The Docks Commission's original order of February 25, 1924 fixed a schedule of

"Harbor Fees for the purpose of meeting the expense attendant upon the supervision of the Port and execution of the regulations and providing for the proper accommodation of vessels at this Port" (R. 23, 58).

This did not contemplate particular service to any ship.

The Supreme Court of Alabama nevertheless held the Commission's order to be constitutional and valid and the fees in suit to be lawful charges for "such service". The Court said, R. 60-61:

"The evidence well supports a finding that the harbor fee in question is not a tax imposed for the privilege of entering the port, a tax on the privilege of navigation upon the navigable waters, but a charge to cover the expenses of the State agency in supervising and operating the port so that ships may enter and depart from the port in safety and without unnecessary delay; an expense of facilitating navigation, promoting commerce. • • •

"It may be truly said the *general supervision or policing of the harbor* to maintain conditions of safety therein in all kinds of weather is for the benefit of the shipping public. But this is true because of service to each ship, as a part of the shipping public" (Italics ours).

Assignments of Error

The assignments of error are at R. 66-67 and raise the objections based on Art. I, Sec. 10, Cl. 3, and Art. I, Sec. 8, Cl. 3 of the Constitution of the United States, all of which will be urged.

ARGUMENT

I. The Mobile harbor fee in question is a duty of tonnage prohibited by the Constitution of the United States.

The Constitution provides in Art. I, § 10, cl. 3:

"No State shall, without the Consent of Congress, lay any Duty of Tonnage".

In *Cannon* v. *New Orleans,* 20 Wall. 577, 581, this Court said:

"Whatever more general or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty or tax or burden imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition".

In *Steamship Company* v. *Portwardens,* 6 Wall. 31, 35, this Court said:

"It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty".

In *State Tonnage Tax Cases,* 12 Wall. 204, 217-218 an Alabama statute which levied a tax on all vessels "plying in the navigable waters of the State" at "the rate of $1 per ton of the registered tonnage thereof", without regard to value, was held to be unconstitutional, and this Court said:

"• • • the tax is just what the language imports, a duty of tonnage, which is made even plainer when it

comes to be considered that the steamboats are not to be taxed at all unless they are 'plying in the navigable waters of the State', showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the State".

In *Inman Steamship Co.* v. *Tinker,* 94 U. S. 238, 243, wherein a New York statute was held unconstitutional because it imposed a tonnage duty, this Court said:

"In this law of the State there are several important points that must not be overlooked. The charge is not exacted for any services rendered or offered to be rendered. If the vessel enter the port and immediately take her departure, or load or unload, or make fast to any wharf, either of these things disjunctively brings her within the act, and makes her liable to the burden prescribed.

The charge is applied wholly irrespective of the *ad valorem* principle."

The so-called harbor fee involved in the case at bar is clearly a duty of tonnage within the constitutional prohibition. It contains all the essentials of such a duty. The fee was determined by the vessel's tonnage, irrespective of value, and was charged *only* "for trips in and out of the harbor" (R. 47). It was not for specific service rendered to a partciular vessel, but a charge for "the general supervision or policing of the harbor" (Opinion, R. 60). The harbor master was right in admitting that in principle his supervision was the same as that of traffic officers in the city of Mobile (R. 50). If this "harbor fee" is a valid charge there would not appear to be any reason why appellant might not lawfully be required to pay a portion (specifically) of the expense of maintaining the Mobile police force because it patrols the waterfront.

That the fee in question was prescribed to raise money for public purposes is clear from the State Court's finding

that it was "a charge to cover the expenses of the State agency in supervising and operating the port" (R. 60). It is therefore a tax of the prohibited class, *i. e.*, a tonnage tax, because it is a fee for admission to the harbor and for use thereof by appellant's steamers (Opinion, R. 65). The fact that steamship companies are presumably benefited because Mobile harbor is supervised does not alter the nature of the charges made as being a tax for public purposes. See *Bauman* v. *Ross*, 167 U. S. 548, 589.

In *Steamship Company* v. *Portwardens*, 6 Wall. 31, 34 a Louisiana statute which allowed wardens of the port of New Orleans to charge $5, whether called on to perform any service or not, for every vessel arriving in that port, was held to be unconstitutional because it burdened interstate commerce and also because it was a duty on tonnage. This Court said:

"It may be true that the existence of such a body of men is beneficial to commerce, but the same is true of the government of the State, of the city government, of the courts, of the whole body of public functionaries. If the constitutionality of the charge for the benefit of the master and wardens can be maintained upon the ground that it secures compensation for services, it is difficult to perceive upon what grounds the constitutionality of any State law imposing taxes for the benefit of the State government upon vessels landing in its ports, can be questioned".

In *Board of Harbor Commissioners* v. *Pashley*, 19 So. Car. 315, 323, the Board sued to recover a charge of 5¢ "per foot of length over all" under a South Carolina statute authorizing the Board to fix fees to be "charged upon all vessels arriving" at Charleston. The Supreme Court of South Carolina denied recovery to the Board on the ground that the charge sued for was a tonnage duty

prohibited by the Constitution of the United States. The Court said:

"Every vessel, upon entering the port, was liable to pay such charges whether it received any service or not. Its manifest object was to provide the means of paying the officers of the State and the expenses incident to the performance of their duties, and cannot be regarded as anything more or less than as a tax to raise a revenue for that purpose; and we see no reason why, with just as much reason, the State might not levy a similar contribution upon every vessel entering the port of Charleston, for the purpose of contributing to the means necessary to pay the police who are charged with the duty of preserving order on the wharves as well as in other parts of the city; and this no one would contend for".

The prohibition in the Constitution against laying tonnage duties cannot be evaded by charging vessels as for wharfage facilities or for any service not actually rendered.

In *Cannon* v. *New Orleans,* 20 Wall. 577, Cannon sued the City to recover money which he had paid under an ordinance which fixed "levee and wharfage dues" on "all steamboats *which shall moor or land in any part of the port of New Orleans*" at a specified rate per ton if in port not exceeding five days and at $5 per day thereafter. The Supreme Court of Louisiana upheld the constitutionality of these "dues" on the ground that they were "charged as compensation for commercial facilities furnished by the city" (20 Wall. 578-579). That decision was reversed by this Court, which held the "dues" to be a tonnage tax prohibited by the Constitution and that since charged irrespective of where the vessel moored they were not compensation for use of the city's wharves.

In *City of Oakland* v. *E. K. Wood Lumber Company,* 211 Cal. 16, 292 Pac. 1076, a city ordinance, imposing

wharfage charges for use of wharves operated by the city and requiring payment of a like amount as a condition of obtaining a permit to land *at any other wharf,* was held by the California Supreme Court to be invalid because it violated the Federal Constitution. The Court said (211 Cal. at 26):

"Any imposition of such a charge on all vessels which land in the harbor, irrespective of whether they use the facilities and services furnished by the municipality when there may exist an election to do otherwise, must be held to be an impost on navigation and therefore unconstitutional. The fact that they land at some wharf within the harbor is not sufficient. The charge may only be exacted in exchange for facilities or services belonging to or furnished by the municipality imposing the charge. We can see no escape from the conclusion that the present ordinance requiring every vessel to land at the city's wharves, or, upon paying the same charge, be entitled to a permit to land at some other wharf in the city, is not a charge, as to vessels so landing elsewhere, for facilities or services furnished by the city. As to such vessels the exaction must be deemed to be a charge for the privilege merely of stopping in the plaintiff's harbor and, as such, constitutes a restriction on free commerce and navigation in violation of the constitutional prohibition".

The foregoing cases and others are discussed in an annotation in 80 A. L. R. 388-392, entitled "Imposition of wharfage or dockage fees, by state or municipality, as tonnage duty".

In *Packet Co.* v. *Keokuk,* 95 U. S. 80, 86, this Court said:

"No doubt, neither a State nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted, but the ordinances will always be carefully scrutinized. In *Cannon* v. *New Orleans,* the ordinance was held invalid, not because the charge was for wharfage, nor even because

it was proportioned to the tonnage of the vessels, but because the charge was not for wharfage or any service rendered. It was for stopping in the harbor, though no wharf was used. Such, also, was *North-western Packet Co.* v. *St. Paul*, 3 Dill. 454. So, in *Steamship Company* v. *Port Wardens*, 6 Wall. 31, the statute held void imposed a tax upon every ship entering the port. This was held to be alike a regulation of commerce and a duty of tonnage. It was a sovereign exaction, not a charge for compensation. Of the same character was the tax held prohibited in *Peete* v. *Morgan*, 19 *id.* 581".

The distinction between a legitimate charge for service rendered and a tax imposed for the privilege of entering or using a port is clearly stated in *Packet Co.* v. *Keokuk*, *supra*, 95 U. S. at 84-86, and in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 698-699.

Congress has not given its consent that the State of Alabama should lay a duty of tonnage. On the contrary, the Act of March 2, 1819, 3 U. S. Stat. 489, which enabled the People of Alabama Territory to form a Constitution and State government and provided for the admission of such State into the Union, contained in Sec. 6 the following proviso:

"That the said convention [authorized to form a constitution and state government] shall provide, by an ordinance irrevocable without the consent of the United States, * * * that all navigable waters within the said state shall forever remain public highways, free to the citizens of said state and of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state" (3 U. S. Stat. 489, at 492).

That compact became part of the organic law of Alabama. Alabama Constitution 1901, Sec. 24; Alabama Code 1923, Secs. 33, 36.

Furthermore, Congress has by general legislation prohibited the imposition of tonnage duties on vessels "trading

from one port within the United States to another port within the United States" (R. S. 4220; Title 46 U. S. C. § 122).

II. Imposition of the Mobile harbor fees on appellant's vessels engaged in interstate commerce violates the commerce clause of the Federal Constitution.

The fees sued for were for use of the harbor by appellant's ships engaged in coastwise trade between New York and Mobile (R. 22, 58, 65). Imposition of such fees directly burdens interstate commerce and violates the commerce clause of the Constitution, Art. I, Sec. 8, cl. 3, which places in Congress the power "to regulate commerce • • • among the several states".

The power of Congress is exclusive as to those subjects which require a general system or uniformity of regulation. *Minnesota Rate Cases,* 230 U. S. 352, 399. By clause 1 of Sec. 8, Art. I of the Constitution, Congress was given power to lay and collect duties, to be uniform throughout the United States. By Title 46 U. S. Code § 122 (R. S. 4220) it is provided:

"No vessel belonging to any citizen of the United States, trading from one port within the United States to another port within the United States, • • • shall be subject to tonnage tax or duty, if such vessel be licensed, registered or enrolled".

The Supreme Court of Alabama in *Harbor Master and Port Wardens of Mobile* v. *Captain Southerland,* 47 Ala. 511, recognized that harbor fees such as those here involved are contrary to the commerce clause of the Federal Constitution. That Court then said (515-516):

"If this act, and the said ordinance passed by the city authorities of Mobile, really mean that every steamer or

sailing vessel that comes into the bay and harbor of Mobile for the purpose named in said ordinance, must pay the fees therein specified, whether the services of the harbor master and port wardens, or either of them, become necessary, or not, and when no services are in fact rendered then we are prepared to pronounce the said act and ordinance unconstitutional. If no other reasonable construction can be given to said act and ordinance, then they amount to a regulation of commerce, and are in conflict with the constitution of the United States on this subject. *Steamship Company* v. *Port Wardens,* 6 Wall. 31".

In *Steamship Company* v. *Portwardens,* 6 Wall. 31, 33 this Court, condemning a statutory fee of $5 in favor of port wardens as unconstitutional because contrary to the commerce clause, said:

"That the act of the legislature of Louisiana is a regulation of commerce can hardly be doubted. It imposes a tax upon every ship entering the port of New Orleans, to be collected upon every entry. In the case of a steamer plying between that port and ports in adjoining States of Alabama or Texas, it becomes a serious burden, and works the very mischief against which the Constitution intended to protect commerce among the States".

In *Harman* v. *Chicago,* 147 U. S. 396, 407 a city ordinance imposing a license tax for the privilege of navigating the Chicago River on steamtugs licensed by the United States authorities, was held to be unconstitutional because it conflicted with the exclusive power of Congress to regulate interstate and foreign commerce. The City argued that the license fee was for benefits conferred by the City in providing an improved waterway. Rejecting this argument, the Court said (411-412):

"The license fee is a tax for the use of navigable waters, not a charge by way of compensation for any specific improvement. The grant to the city under which the ordinance was passed is a general one to all municipalities

of the State. Waters navigable in themselves in a State, and connecting with other navigable waters so as to form a waterway to other States or foreign nations, cannot be obstructed or impeded so as to impair, defeat or place any burden upon a right to their navigation granted by Congress."

In *Helson and Randolph* v. *Kentucky*, 279 U. S. 245, a Kentucky statute, imposing a tax on gasoline purchased outside but used inside the State as fuel on a ferry engaged in interstate commerce, was held to contravene the commerce clause. This Court said (248-249):

"Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this Court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation or otherwise, constitutes a regulation beyond the power of the state under the Constitution."

And further, at 252:

"The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce."

See also *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59; *Foote* v. *Maryland*, 232 U. S. 494; *Cooney* v. *Mountain States Tel. Co.*, 294 U. S. 384, 392.

The decisions cited govern the case at bar. Appellant's ships were instrumentalities of interstate commerce and

as such are immune from the tax imposed by appellee for the privilege of using Mobile harbor. Whether the harbor fee in question be considered a tonnage tax or a license tax, it is a direct burden on interstate commerce and invalid.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE SUPREME COURT OF ALABAMA SHOULD BE REVERSED WITH COSTS AND ENTRY OF JUDGMENT DIRECTED IN FAVOR OF APPELLANT, WITH COSTS.

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